IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.THANKAPPAN

THURSDAY, THE 5TH JULY 2007 / 14TH ASHADHA 1929

CRL.A.No. 1404 of 2004(C)

SC.448/2002 ON THE FILE OF THE COURT OF ADDL. DISTRICT & SESSIONS COURT, FAST TRACK (ADHOC II), KOZHIKODE.

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APPELLANT: ACCUSED.

PREMAN, AGED 42 YEARS, S/O.GOPALAN,
AADUPURAYIL VEEDU, NANMINDA AMSOM, KOZHIKODE DISTRICT.

BY ADV. SRI.JACOB ABRAHAM
SMT.KOCHUMOL KODUVATH

RESPONDENT: COMPLAINANT.

STATE OF KERALA, REP. BY THE SUB INSPECTOR OF POLICE, ELATHUR, KOZHIKODE DISTRICT, REP. BY THE PUBLIC PROSECUTOR, HIGH COURT OF KERALA, ERNAKULAM.

BY PUBLIC PROSECUTOR SRI.C.M.KANNAPPU

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 05/07/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

K.Thankappan, J.

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Crl. A. No. 1404 of 2004

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Dated this the 5th day of July, 2007

JUDMENT

Appellant, accused in S.C.No.448/2002 on the file of the Court of the Additional District and Sessions Judge (Adhoc) II, Kozhikode, was found guilty under section 55(a) of the Abkari Act The allegation against the appellant was that he was found in possession of 4 litres of illicit arrack in a 5 litre plastic can and also selling the same in the property owned by Kandamkulangara Sidharthan on the south-western side of Poorathara near Eranhikkal Bridge in Pavangad-Atholi road of Kozhikode Taluk. For the prosecution side, PW1 to PW4 were examined and Exts.P1 to P7 were marked. MO1 to MO3 series were also marked on the side of the prosecution. After closing the evidence, the appellant was questioned under section 313 of Cr.P.C. He denied the allegation. On the side of the defence, Exts.D1 and D2 C.D. contradictions of the witnesses were marked. Relying on the evidence adduced by the prosecution both, oral and documentary, the trial court found the appellant guilty under section 55(a) of the the Abkari Act and he was convicted thereunder and sentenced to undergo simple imprisonment for two years and to pay a fine of

Rs.1,00,000/- and in default to undergo simple imprisonment for six months. The above conviction and sentence awarded against the appellant are assailed in this appeal.

2. This Court heard the learned counsel for the appellant and the learned Public Prosecutor.

3. The learned counsel for the appellant had taken three contentions to challenge the impugned judgment. Firstly, it is contended that the trial court went wrong in placing reliance on the official witnesses to find the appellant guilty of the charge, as there were contradictions in their evidence. Secondly, it is contended that the prosecution had not discharged its burden to adduce evidence before the court regarding the keeping of the residue. Thirdly, it is contended that the finding of the trial court that the appellant committed offence punishable under section 55(a) of the Abkari Act is not sustainable in the light of decisions reported in Surendran V.State of Kerala (2004(1) KLT 404 and Sudhepan @ Aniyan V. State of Kerala (2005(2) KLT (Cri) 631).

4. As per the evidence of PW1 Sub Inspector of Police, Elathur, it is revealed that on 5-1-2000 while he was on patrol duty along with police party and when they reached at the place of occurrence, they saw the appellant with a plastic can in his right hand and a glass in his left hand

and pouring the liquid from the plastic can to the glass. It was also revealed that on examination, it was found that the can containing 4 litres of illicit arrack. The appellant was arrested and sample was taken into two 375 ml. bottles for analysis. The plastic can containing balance arrack and an amount of Rs.150/- which was also seized from the pocket of the appellant were also taken into custody. Appellant and thondi articles were brought to the police station and registered Ext.P2 First Information Report against the appellant. The evidence of PW1 is corroborated by the evidence of PW2 who accompanied PW1 on the date of the incident. Evidence of PW2 would show that while they were on patrol duty, they saw the appellant was found in possession of MO1 can which contained 4 litres of arrack. The evidence of PW1 and PW2 is corroborated by the evidence of PW3 independent witness. PW3 stated that he saw the incident. He identified MO1 and MO2. Though they were cross-examined, their evidence was not shattered. It has come out in evidence that the case was detected on 5-1-2000 and the properties were produced before the court on 6-1-2000 and it was directed to produce later. Hence, the prosecution proved that the appellant was found in possession of four litres of arrack on 5-1-2000.

5. Question to be considered is whether or not the prosecution had

succeeded in proving that the appellant had committed an offence punishable under section 55(a) of the the Abkari Act ?

6. The appellant was tried for an offence punishable under section 55(a) of the the Abkari Act. The contention of the learned counsel for the appellant is that the trial court ought to have found that the prosecution has failed to prove that the appellant was engaged in selling arrack as alleged in the complaint. After considering the evidence, the trial court found that there was cogent, convincing and reliable evidence that the contraband articles were seized from the conscious possession of the appellant. But, the trial court also found that there was no evidence to show that the appellant was selling the arrack to a third person. In Surendran 's case (Supra) a Division of this Court held that when a person is in "possession of illicit liquor" while illegally importing it, the case would be covered under section 55(a) of the Abkari Act and in a case where the possession is of illicit liquor the case would fall within section 58 of the Abkari Act. In Sudhepan @ Aniyan V. State of Kerala (2005(2) KLT (Cri) 631) , this Court held that under section 55(a) the prosecution must allege and prove that possession of the contraband liquor was incidental or in connection with export, import, transport or transit of liquor. Significantly, in the present case there is no such allegation at all.

7. The prosecution case is that the appellant was found in possession of 4 litres of illicit arrack. The prosecution has no case that the possession of the contraband article was in connection with export, import, transport or transit of liquor as contemplated under section 55(a) of the Abkari Act. Hence, as per the principles laid down in Sudhepan @ Aniyan V. State of Kerala (2005(2) KLT (Cri) 631), this Court is of the view that the mere possession of the contraband liquor is not an offence punishable under section 55(a) of the Abkari Act. The prosecution case is that the appellant was found in possession of 4 litres of illicit arrack and selling the same. The trial court found that the contraband articles were seized from the conscious possession of the appellant and that there was no evidence to show that the appellant was selling the illicit arrack to third person. Therefore, the finding of the trial court that the appellant was found guilty under section 55(a) of the Abkari Act is not legally sustainable.

8. Hence, the conviction and sentence awarded against the appellant under section 55(a) of the Abkari Act are set aside and the appellant is acquitted. Bail bond of the appellant stands cancelled. The appeal is accordingly allowed.

K. Thankappan,
Judge.

K. Thankappan,J.

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Crl.A. No. 2038 of 2006

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Judgment

2-2-2007